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In the Supreme Court of the United States

OCTOBER TERM, 1978

STEPHEN R. DEANGELO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-4a) is reported at 584 F. 2d 46. The oral opinion of the district court (Pet. App. 1a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1978, and a petition for rehearing was denied on October 30, 1978 (Pet. App. 5a). On December 6, 1978, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including December 6, 1978, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the physical inspection of petitioner's briefcase at an airline security checkpoint violated the Fourth Amendment, where petitioner had voluntarily consented to an x-ray examination of his briefcase as a prerequisite to boarding an airplane and that examination had revealed large suspicious dark areas in the briefcase.

STATEMENT

Following a bench trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on two counts charging possession of marihuana and cocaine, in violation of 21 U.S.C. 844(a). He was sentenced to six months' imprisonment followed by two years' probation. The court of appeals affirmed (Pet. App. 2a-4a).

The evidence at trial showed that at approximately 8:45 p.m. on October 4, 1977, petitioner entered the security screening area in Washington National Airport in order to board the 9:00 p.m. Eastern Airlines shuttle flight to New York (S. Tr. 16, 17; Tr. 8-9, 48).[1] All passengers at the airport must pass through a checkpoint where they and their carry-on baggage are inspected for dangerous weapons and explosives. See 49 U.S.C. 1356, 1511. At least four signs were posted near and around the boarding-security area, alerting passengers that they and their carry-on baggage were subject to inspection. The sign on the x-ray machine read:

X-RAY BAGGAGE INSPECTION

Carry-on baggage is being
inspected by X-ray

* Inspection will not affect ordinary undeveloped film

[1]"S. Tr." refers to the transcript of the suppression hearing. "Tr." refers to the transcript of the trial.

* Remove all X-ray and scientific film from baggage
* Physical inspection may be requested

(Gov't Exh. 1; S. Tr. 19, 34, 37).[2]

Petitioner voluntarily placed his briefcase on the table for the purpose of x-ray inspection and then proceeded through the magnetometer (S. Tr. 24; Tr. 9, 14-15).[3] Because a large portion of the briefcase appeared dark on the x-ray machine, the security checker, Edna Rogers, informed petitioner that his bag would have to be opened for visual inspection (S. Tr. 21-22, 33; Tr. 10).[4] When petitioner objected and attempted to wrest his bag out of Rogers' hands, Federal Aviation Administration Police Officer James McRae, Jr., interceded on Rogers' behalf and told petitioner that they would have to inspect the briefcase before petitioner could board the plane (S. Tr. 22-23, 25; Tr. 10). Petitioner, who now appeared extremely nervous, said that he would take another mode of transportation to New York (S. Tr. 23, 24). However, Officer McRae responded that the briefcase had to be opened and searched for weapons, which he proceeded to do (S. Tr. 23, 62; Tr. 15). Plainly visible in the opened briefcase were 32 grams of marihuana, 14 grams of hashish and approximately $21,000 in cash (S. Tr. 38, 40, 42; Tr. 15-16, 29, 38, 49-50; Gov't Exh. 2). A search of petitioner incident to arrest produced 13 more grams of marihuana and a small amount of cocaine (Tr. 17-18, 36-37, 49, 50-51; Gov't Exhs. 3 & 4).

Petitioner moved to suppress the seized drugs, claiming that the physical search of his briefcase violated the

[2]The court of appeals slightly misquoted the sign (Pet. App. 3a).

[3]The briefcase was large enough to contain various weapons or explosives (S. Tr. 26-27).

[4]Rogers was employed by a private security agency (S. Tr. 16; Tr. 12).

Fourth Amendment. Petitioner contended that he had not consented to the search and that he should have been permitted to leave the airport rather than submit to the inspection. The district court denied the motion, however, finding that the search was reasonable in light of all the circumstances (Pet. App. 1a). The court of appeals affirmed, concluding that petitioner had consented to the search and that it was justified in any event under the rationale of *Terry* v. *Ohio*, 392 U.S. 1 (1968), in order to prevent possible injury to the officers or other persons at the airport (Pet. App. 2a-4a).

ARGUMENT

Petitioner contends (Pet. 5-12) that the search of his briefcase violated the Fourth Amendment. But, as the court of appeals correctly concluded, the search was justified under either of two rationales. First, under the principles of *Terry* v. *Ohio*, 392 U.S. 1 (1968), the airport security personnel properly opened petitioner's briefcase once the x-ray had shown large, suspicious dark areas inside the bag and petitioner had nervously attempted to wrest it away from the security guards (Pet. App. 3a). Second, by proceeding through the well-marked security area and voluntarily placing his briefcase on the x-ray table for electronic examination, petitioner consented to the further physical examination of his briefcase (Pet. App. 4a). No court of appeals has reached a contrary result with regard to a search similar to that involved here, and further review by this Court is therefore unwarranted.

1. Although petitioner asserts that the FAA officer violated his Fourth Amendment rights by physically inspecting his briefcase, "[i]t must always be remembered that what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Elkins* v. *United States*, 364 U.S. 206, 222 (1960). See *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977). Petitioner entered the airline security checkpoint area

intending to board an airplane. In accordance with statutorily mandated FAA regulations,[5] the airline personnel subjected both petitioner and his briefcase to initial electronic searches.[6] When the x-ray attendant announced that the bag had to be physically inspected (because its contents appeared suspicious), petitioner nervously attempted to take back the briefcase and leave the security area. Since at that point "the circumstances were sufficiently suspicious to cause a reasonably prudent man to conclude that [petitioner] might endanger the security officers and the other passengers in the airport" (Pet. App. 3a), the limited physical search that subsequently occurred did not violate the Fourth Amendment. See *Terry* v. *Ohio*, *supra*, 392 U.S. at 27.

This Court held in *Terry* that, even in the absence of probable cause to arrest, a policeman could stop a person for questioning and conduct a limited search for weapons where "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." 392 U.S. at 27. See also *Pennsylvania* v. *Mimms*, *supra*; *Adams* v. *Williams*, 407 U.S. 143 (1972). In concluding that such searches were reasonable, the Court balanced the nature and extent of

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[5]In order to stem the tide of air piracy, Congress enacted the Air Transportation Security Act of 1974, Pub. L. No. 93-366, 88 Stat. 415. In addition to prohibiting various acts of air piracy, including an attempt to carry weapons aboard an airplane (see 49 U.S.C. 1472), the statute directs the FAA to promulgate regulations designed to deter and apprehend hijackers. See 49 U.S.C. 1356, 1511. Accordingly, the FAA requires air carriers to use weapon detection devices to screen all passengers and property that the airlines intend to carry. See 14 C.F.R. 121.538(b).

[6]Petitioner voluntarily went through the magnetometer and voluntarily placed his bag on the table for x-ray inspection. He concedes that these initial searches did not violate the Fourth Amendment (Pet. 7).

the governmental interests involved (protection of law enforcement officers and the public) against the intrusion on individual privacy occasioned by a limited weapons search. 392 U.S. at 22-27. See also *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *Camara* v. *Municipal Court*, 387 U.S. 523, 537 (1967).

In the context of airplane hijackings, the governmental interest, as measured by the threat to the public, is unquestionably substantial. As Judge Friendly has observed (*United States* v. *Bell*, 464 F. 2d 667, 675 (2d Cir.) (concurring opinion), cert. denied, 409 U.S. 991 (1972)):

> When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.

By the same token, the intrusiveness of airline security procedures is significantly less than that posed by the street encounters approved in *Terry*. Because all passengers, having voluntarily submitted to the security check by choosing to travel by airplane, are subject to the procedures, the limited weapons searches that occur do not carry any stigma. See *United States* v. *Edwards*, 498 F. 2d 496, 500 (2d Cir. 1974); *United States* v. *Skipwith*, 482 F. 2d 1272, 1275-1276 (5th Cir. 1973). Moreover, the public nature of the limited search and the airlines' strong interest in minimizing harassment of their passengers greatly reduce the likelihood that abusive searches will occur. *Ibid.* In addition, a passenger can further reduce the chance that his luggage will be physically searched by

checking it on board the airplane rather than carrying it on personally. Accordingly, all the courts of appeals that have considered the question have concluded that a limited *Terry*-type weapons search of a passenger and his carry-on baggage does not violate the Fourth Amendment, provided that there are "specific, articulable facts * * * to support a reasonably prudent man's belief that his or others' safety might be in danger." *United States* v. *Albarado*, 495 F. 2d 799, 810 (2d Cir. 1974). See, *e.g.*, *United States* v. *Homburg*, 546 F. 2d 1350, 1352-1354 (9th Cir. 1976), cert. denied, 431 U.S. 940 (1977); *United States* v. *Edwards*, *supra*; *United States* v. *Dalpiaz*, 494 F. 2d 374 (6th Cir. 1974); *United States* v. *Fern*, 484 F. 2d 666 (7th Cir. 1973); *United States* v. *Skipwith*, *supra*; *United States* v. *Kroll*, 481 F. 2d 884, 886-887 (8th Cir. 1973); *United States* v. *Slocum*, 464 F. 2d 1180 (3d Cir. 1972); *United States* v. *Epperson*, 454 F. 2d 769 (4th Cir.), cert. denied, 406 U.S. 947 (1972).

Here, petitioner's briefcase failed to satisfy the x-ray examination. The large suspicious dark areas that showed on the x-ray screen could well have contained a pistol, explosive or other dangerous weapon. See, *e.g.*, *United States* v. *Moreno*, 475 F. 2d 44, 49 (5th Cir.), cert. denied, 414 U.S. 840 (1973). And when the x-ray attendant stated that she would have to open the suspicious briefcase, petitioner became extremely nervous and attempted to wrest the briefcase away from her. In these circumstances, the officers had reasonable grounds to fear for their own safety and the safety of the passengers who had already passed through the screening devices (see Pet. App. 3a),[7] and they therefore properly opened petitioner's briefcase to look for weapons.[8] See, *e.g.*, *United States* v. *Edwards*,

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[7]At the time petitioner entered the boarding area, some 50 other passengers had already cleared security (S. Tr. 20).

[8]Once the briefcase was opened, of course, the officers were justified in seizing the marihuana that fell into plain view.

supra, 498 F. 2d at 500-501; *United States* v. *Kroll*, *supra*, 481 F. 2d at 886-887; *United States* v. *Slocum*, *supra*, 464 F. 2d at 1183.

2. The court of appeals also correctly concluded that petitioner consented to the search of his briefcase by attempting to pass through the security checkpoint and to board the airplane. A number of signs warned petitioner that airline passengers and their carry-on luggage were subject to search prior to boarding.[9] Furthermore, "because of the widespread publicity given to the government's efforts to cope with the piracy of aircraft, it [is] general knowledge that citizens boarding planes [are] subject to special scrutiny and to weapon searches." *United States* v. *Skipwith*, *supra*, 482 F. 2d at 1274.[10]

Petitioner, nonetheless, voluntarily chose to travel by airplane. He therefore filled out his boarding pass, entered the security area and placed his briefcase upon the x-ray table for inspection. Although petitioner concedes that he thereby consented to the initial electronic searches, he claims that he should have been allowed to revoke his consent when his bag did not pass the x-ray inspection, so

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[9]In addition to the sign that was posted on the x-ray machine, FAA requires that the following sign be posted in the vicinity of the security checkpoint (C.A. App. A-14 to A-15):

> IT IS A CRIME to carry a concealed weapon aboard aircraft
>
> Federal safety rules require inspection of persons and hand carried articles passing an inspection point
>
> Inspection may be refused
>
> Persons refusing inspection will not be permitted to pass the inspection point

("C.A. App." refers to the appendix in the court of appeals.)

[10]In any event, knowledge of the right not to consent to a search is not a prerequisite to the valid waiver of Fourth Amendment rights. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973). The fact that the consent is, as here, an informed decision is a factor to be considered by the courts in assessing the existence and scope of the consent (*ibid.*).

long as he was willing to forego the airplane trip (Pet. 7).[11] But petitioner's consent to the inspection of his briefcase necessarily encompassed not only the x-ray analysis but also any further reasonable procedures needed to ensure that petitioner was not carrying a weapon. See, *e.g.*, *United States* v. *Skipwith*, *supra*, 482 F. 2d at 1276-1277.[12]

Petitioner's position, if accepted, would allow an airline passenger to withdraw his consent whenever the initial search indicated that he might be carrying a weapon. It would thus create a risk-free inspection system for would-be hijackers. If the hijacker's weapons are not detected by the x-ray machine or magnetometer, he would board the airplane. If they are detected, he would merely withdraw from the security area, free to try another day. In short, as the court of appeals correctly concluded, petitioner's informed decision to board the airplane must constitute a consent to the full security screening process. See *United States* v. *Williams*, 516 F. 2d 11 (2d Cir. 1975); *United States* v. *Edwards*, *supra*, 498 F. 2d at 501-505 (Oakes, J., concurring); *United States* v. *Davis*, 482 F. 2d 893, 913 (9th Cir. 1973); *United States* v. *Skipwith*, *supra*,

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[11]Petitioner relies (Pet. 8-9) on the wording of the x-ray sign. See pages 2-3, *supra*. However, the phrase "physical inspection may be requested" refers only to a passenger's option of asking to have his belongings (*e.g.*, scientific or developed photographic film) physically inspected rather than risking x-ray damage. Thus, there is no basis for arguing that the FAA officer, in protecting the public, was limited to "requesting" a physical examination of petitioner's bag.

[12]Of course, the consent is limited only to reasonable procedures calculated to detect weapons. If these procedures are exceeded, the fruits of the unreasonable search would not be admissible on the consent rationale. See *United States* v. *Kroll*, *supra*, 481 F. 2d at 886. Petitioner does not contend that the search in this case exceeded the scope required to maintain airport security or that it was merely a pretext to look for items other than weapons.

482 F. 2d at 1281 (Aldrich, J., dissenting on other grounds).[13]

[13]Petitioner erroneously contends (Pet. 5-6) that the decision below conflicts with other courts of appeals' decisions. Although the Ninth Circuit indicated in *United States* v. *Homburg*, *supra*, that a particular airport search was not justified as a matter of consent, that statement was dictum, since the court upheld the search on the rationale of *Terry* v. *Ohio*, *supra*. Two earlier Ninth Circuit cases are also distinguishable because at the time of the searches, which occurred before the airlines posted warning signs, the passengers had not yet entered the boarding area. See *United States* v. *Moore*, 483 F. 2d 1361 (9th Cir. 1973); *United States* v. *Miner*, 484 F. 2d 1075 (9th Cir. 1973). And the continuing validity of *United States* v. *Davis*, 482 F. 2d 893 (9th Cir. 1973), insofar as it rejected the *Terry* rationale, has been called into question by the Ninth Circuit's subsequent decision in *Homburg*. Moreover, *Davis* involved a search that occurred before the FAA required airlines to post signs warning passengers that they were subject to search. Finally, the Eighth Circuit's decision in *United States* v. *Kroll*, *supra*, is completely in accord with the decision below. In that case, the court found that although the principles enunciated in *Terry* justified a briefcase search similar to that which occurred here, the further search of a seemingly innocent envelope found inside the briefcase was not required by considerations of airport security.

Petitioner's reliance upon *Bumper* v. *North Carolina*, 391 U.S. 543 (1968), is also misplaced. That case involved a "consent" based upon official coercion. Here, petitioner concedes that he knowingly consented to the initial x-ray search (Pet. 7).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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